U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

DATE: JUN 0 5 2015

FILE #:
PETITION RECEIPT #:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

Enclosed is the non-precedent decision of the Administrative Appeals Office (AAO) for your case.

If you believe we incorrectly decided your case, you may file a motion requesting us to reconsider our decision and/or reopen the proceeding. The requirements for motions are located at 8 C.F.R. § 103.5. Motions must be filed on a Notice of Appeal or Motion (Form I-290B) **within 33 days of the date of this decision**. The Form I-290B web page (www.uscis.gov/i-290b) contains the latest information on fee, filing location, and other requirements. **Please do not mail any motions directly to the AAO**.

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center. The subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on a motion to reopen. The motion will be granted, the appeal will remain dismissed and the petition will remain denied.

The petitioner filed the above-referenced Form I-140, Immigrant Petition for Alien Worker, seeking to permanently employ the beneficiary in the United States as a business development manager. The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL).

The director denied the petition on January 27, 2014, finding that the petitioner had not established that the beneficiary possessed the minimum required experience set forth on the labor certification.

On July 25, 2014, we dismissed the petitioner's appeal because the experience letters in the record did not establish the beneficiary's five years of progressive post-baccalaureate experience. Therefore, we found that the beneficiary did not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act and did not meet the minimum requirements of the offered position as set forth on the labor certification.

The instant motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted.

Beneficiary Qualifications

On motion, the petitioner has offered updated work experience letters and complete merger documents between . Upon review of the evidence submitted on motion we find that the beneficiary, more likely than not, possesses the required five years of progressive post-baccalaureate experience in order to be classified as a member of the professions holding an advanced degree under section 203(b)(2) of the Act. Further, the record demonstrates that the beneficiary meets the minimum requirements of the offered position as set forth on the labor certification.

Although the petitioner has overcome the basis for denial, the petition may not be approved for the foregoing reasons.

On October 24, 2014, we sent a Request for Evidence (RFE) and a subsequent Notice of Intent to Deny (NOID) seeking regulatory prescribed evidence of the petitioner's ability to pay the proffered wage to all beneficiaries since the priority date of January 8, 2013 to the present. Additionally, we requested evidence that a *bona fide* job opportunity continues to exist.

Ability to Pay the Proffered Wage

Beyond the director's decision, the petitioner has not demonstrated its ability to pay the proffered wage to the instant and all of its beneficiaries. We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on January 8, 2013. The proffered wage as stated on the ETA Form 9089 is $156,998.00 per year.

The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in [redacted] to have a gross annual income of $1,560,447, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based on the calendar year. On the ETA Form 9089, signed by the beneficiary on June 14, 2013, the beneficiary claimed to have worked for the petitioner since October 1, 2009.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the

[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988).

priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142, 144 (Acting Reg'l Comm'r 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the record contains a 2013 Form W-2 issued to the beneficiary by the petitioner in the amount of $62,733.46, and paystubs issued by the petitioner totaling $49,666 for 2014. The beneficiary's salary for 2013 and 2014 is less than the proffered wage of $156,998.00 per year. Therefore, the petitioner has not established that it paid the beneficiary the full proffered wage from the priority date onwards.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873, 880 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Rest. Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Haw. Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 537 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1084 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of

> the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River St. Donuts, 558 F.3d at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang,* 719 F. Supp. at 537 (emphasis added).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the IRS Form 1120, U.S. Corporation Income Tax Return. The record before us closed on March 6, 2015 with the receipt of the petitioner's submissions in response to our NOID. As of that date, the petitioner's 2014 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2013 is the most recent return available. The petitioner's tax returns demonstrate its net income for 2013, as shown in the table below.

- In 2013, the Form 1120 stated net income of $43,251.

Therefore, for the year 2013, the petitioner did not have sufficient net income to pay the difference between the proffered wage and wages already paid to the beneficiary.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[2] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end

[2] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's tax returns demonstrate its end-of-year net current assets for 2013, as shown in the table below.

- In 2013, the Form 1120 stated net current assets of $216,636.

In our October 24, 2014 RFE, we indicated that the petitioner has filed an additional petition since the petitioner's establishment in 2002. Specifically, we noted that the petitioner filed another petition for another beneficiary after the instant priority date of January 8, 2013 and that this beneficiary became a lawful permanent resident on August 28, 2014. Therefore, we requested evidence of the petitioner's ability to pay the proffered wage to both beneficiaries from January 8, 2013 through August 28, 2014. In the petitioner's November 8, 2014 response to our RFE, the petitioner did not provide evidence of the additional beneficiary's priority date, proffered wage, or 2013 and 2014 salary. This prevents us from making a reasonable determination of the total proffered wages for all of the petitioner's beneficiaries. Therefore, for the year 2013, the petitioner did not establish that it had sufficient net income or net current assets to pay the proffered wage.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

The petitioner asserts in its response to our RFE that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. The petitioner advocates combining its net income with its net current assets to demonstrate its ability to pay the proffered wage to one beneficiary in 2013. In our view, net income and net current assets are not cumulative. We view net income and net current assets as two different methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, we do not agree that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of the petitioner, it reports taxes pursuant to accrual convention, accounts receivable.

The petitioner's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the

proffered wages to all of its beneficiaries from the day the ETA Form 9089 was accepted for processing by the DOL on January 8, 2013.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the petitioner has been in business since 2002 and employs five workers. However, the record is silent concerning the petitioner's established historical growth, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, and whether the beneficiary is replacing a former employee or an outsourced service. The wages paid to the beneficiary in 2013 of $62,733.46 are less than 40% of the proffered wage of $156,988. The beneficiary's 2014 pay stubs show a bi-weekly salary of $2,614.00, which amounts to an annual salary of $67,964. This annual amount is significantly less than half of the proffered wage. Further, the record does not establish the petitioner's total proffered wages owed to all of its beneficiaries. The record does not demonstrate why the petitioner's federal income tax returns are unreliable in establishing an ability to pay the proffered wage to all of its beneficiaries.

The record includes the petitioner's 2012 federal tax return. On this return, the petitioner listed no salaries or wages paid, despite claiming five employees on the labor certification and the petition. Further, the tax returns in the record demonstrate an overall decrease in gross receipts of more than 40%, from $1.5 million in 2012 to $902,823.00 in 2013. While, the record includes only two years of the petitioner's tax returns, a decrease in overall sales in the year of the priority date is not indicative of historical growth and does not show that, in the totality of the circumstances, the petitioner has a continuing ability to pay the proffered wages to all of its beneficiaries.

Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

***Bona fide* Job Opportunity**

On November 8, 2014, the petitioner informed us that it had merged with another company, and that it has now formed . The petitioner also noted that the employer listed on the labor certification and the petition, would continue operations for accounting purposes.

Based on the petitioner's statement, we notified the petitioner that the *bona fides* of the job opportunity were unclear. A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). Under 20 C.F.R. § 626.20(c)(8) and § 656.3, the petitioner must demonstrate that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See also* C.F.R. § 656.17(l); *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). On February 5, 2015, we issued a NOID and sought independent evidence establishing that a *bona fide* job opportunity continues to exist, including what organization will employ the beneficiary.

The petitioner responded on March 6, 2015, and asserted that a mistake had been made by its counsel's paralegal in drafting the RFE response submitted before us on November 8, 2014. The petitioner now states that the companies did not merge and instead they have "joined forces to expand markets and better serve customers." Further, the petitioner states that "both companies are active and continue to do business separately." The petitioner offered screen-prints of the Florida Department of State Division of Corporations showing that and are separate corporate entities.

Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987).

We have reviewed the website for , including a printout from the website submitted by the petitioner in response to our RFE. The website's history page states that, "More recently, merged a large-scale printing and scenic elements company, with the former to form . . . . Today, we are with offices in . We also have warehouses and workshops in Florida and Venezuela. With almost two hundred professionals, technicians and assistants, we have carried out projects in thirty countries, and we can fulfill client needs all over the world." *See* , accessed June 4, 2015.

This is consistent with the website's page, which states that, "More recently, merged with to form " *See*

The petitioner's company website is inconsistent with its statement that it did not merge with It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The evidence submitted in response to our NOID may demonstrate the existence of two separate and active entities of and However, this evidence does not independently and objectively demonstrate that the petitioner, , continues to have a *bona fide* job opportunity for a business development manager.

Therefore, the petition must also be denied because the petitioner has not established that an actual *bona fide* job opportunity continues to exist for the beneficiary with the petitioner.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The motion to reopen is granted. The appeal is dismissed and the petition will remain denied.